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IN THE

Supreme Court of The United States

OCTOBER TERM, 1964

NO. [redacted] 81

L. L. WAINWRIGHT, Director,
Division of Corrections,
State of Florida,

Petitioner,

—vs—

FLOYD L. CULLINS and WILLIAM H. "BILL" CROSS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES W. KYNES
Attorney General
TALLAHASSEE, FLORID
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Assistant Attorney General
Counsel for the Petitioner.

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—vs—

FLOYD L. CULLINS and WILLIAM H. "BILL" CROSS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PRELIMINARY STATEMENT

L. L. Wainwright, Director of the Division of Corrections for the State of Florida, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals in and for the Fifth Circuit entered respectively in the above-entitled case on February 14, 1964, and March 5, 1964.

OPINIONS BELOW

The initial opinions of the Federal District Court in and for the Middle District, Jacksonville, Florida, were filed on July 17, 1963, as to respondent Cullins and on December 26, 1963, and amended on December 27, 1963, as to respondent Cross, and are not reported. They will be found in Appendix I.

The opinions of the court below were filed respectively on February 14, 1964, and March 5, 1964, and are not reported. They will be found in Appendix II.

THE JUDGMENTS

The judgments of the court below were filed on February 14, 1964, and March 5, 1964.

JURISDICTION

The jurisdiction of this Court to enter the writ of certiorari is invoked pursuant to 28 U.S.C., Section 1254 (1).

The judgments sought to be reviewed are in every material particular (both law and fact) identical. Wherefore, this joint petition is filed pursuant to the specific provisions found in Rule 23.5 of the rules of this Court.

QUESTION PRESENTED

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS WAS VESTED WITH JURISDICTION TO DETERMINE THE ISSUE OF:

> DID THE ACTS OF THE STATE OFFICERS IN LOWERING AN ELECTRONIC LISTENING DEVICE DOWN INTO AN AIR SHAFT FROM THE APARTMENT ABOVE, INTO THE APARTMENT THAT WAS SUBSEQUENTLY SEARCHED, TO OBTAIN EVIDENCE THAT WAS USED AS A BASIS FOR PROBABLE CAUSE FOR THE ISSUANCE OF THE SEARCH WARRANT CONSTITUTE AN UNLAWFUL OR UNREASONABLE INTRUSION INTO A CONSTITUTIONALLY PROTECTED AREA AS CONDEMNED AND DEFINED IN THE CASE OF JULIUS SILVERMAN vs. UNITED STATES, NO. 66, DECIDED MARCH 6, 1961, 5 L. ED. (2d) 743, 81 S.Ct. 6[redacted]

IN A MANNER CONTRARY TO LAW, LOGIC AND THE WELL-ORDERED DECISIONS OF THIS COURT.

STATUTES INVOLVED

Though no statute as such is involved in the matters upon which this Court is asked to pass, respondents were tried and convicted under Section 849.09, Florida Statutes, relating to prohibited lotteries.

STATEMENT OF THE CASE

Respondent Cross was the lessee of Apartment 607 in a downtown apartment building in Jacksonville, Florida. On October 17, 1958, special agents of the Florida Sheriffs Bureau, with the consent of the manager of the apartment building, went into Apartment 707, directly above the Cross apartment. In Apartment 707 they removed a grille from an air shaft and lowered a microphone down the air shaft so that it was opposite a grille in Apartment 607. Although not established of record, petitioner concedes (arguendo) that the air shaft, as it passed through the sixth floor, was entirely surrounded by the interior walls of Apartment 607. The microphone was wired to recording and listening devices operated by the officers in the apartment above. Using this electronic equipment the officers overheard conversations between Cross, the tenant of the apartment, and others, including Cullins. The voices of Cullins and Cross were recognized. From the conversations the officers became convinced that Cullins, Cross and others were operating a lottery enterprise. The information so obtained was incorporated in an affidavit of probable cause upon which a warrant was issued for the search of Apartment 607. Cullins and Cross were at the apartment and were placed under arrest. A search was made and gambling paraphernalia were seized.

Cullins, Cross and others were charged by the State of Florida with a violation of the lottery laws. Cullins filed a motion to suppress the evidence procured by the search on the ground that the search was in violation of

his constitutionally protected right to be secure against unreasonable search and seizure. Objections were made to the introduction of the evidence procured at the raid. The motion to suppress was denied. The objections to the admission of evidence were overruled. Cullins was convicted on August 7, 1959. State remedies were exhausted, the validity of the search being upheld in the state courts and also seemingly further upheld by this Court's order dismissing the appeal therefrom—bearing date of April 2, 1962, *Cross et al. v. Florida*, 7 L.ed.2d 840, 369 U.S. 400, 82 S.Ct. 852. A petition for habeas corpus was filed in the United States District Court. After a hearing at which the facts herein recited were developed, the court dismissed the habeas corpus proceedings and issued a certificate of probable cause so as to permit an appeal to this Court. 28 U.S.C.A. § 2253. In making the announcement that a certificate of probable cause would be issued, the district judge observed that the court certifies probable cause, because this is a field that I would like to see examined a little more.

ARGUMENT

Your petitioner will endeavor to demonstrate on the following pages that the court below has either ignored established principles of law or has sought to create new ones in the case at bar, which it did. Moreover, your petitioner will endeavor to demonstrate further that the decision of the court in the premises is perhaps based upon abstract speculations and/or unreal fears rather

than upon the realities either of the case or of the law as it should apply thereto.

Without even so much as offering a clew as to why; if indeed any reason could exist, the court below considered that the circumstances of this case fell within the pale of *Silverman v. United States*, 5 L.Ed. (2d) 743, 81 S. Ct. 679, 275 F. 2d 173, the court simply announced at page five of its opinion (see Appendix II) that the lowering of the microphone into that portion of the ventilating shaft was an invasion of a constitutionally protected area as proscribed by *Silverman*, supra.

The suggestion that the petitioner sought to justify this electronic surveillance by a comparison to the hallways of the apartment building is not accurate. In point of fact, the prime comparison made both before this Court when it dismissed the appeal in this case, *Cross et al. v. Florida*, supra, and as well in the briefs and argument before the lower court was to an attached fire escape serving all the apartments adjacent thereto.

While it might be said that the illustration of the horizontal hallway may be honorably rejected because of a difference of opinion, petitioner considers it impossible to turn away from the illustration of the fire escape. This is so for the simple reason that perhaps a hallway may be considered inapplicable inasmuch as it provides a means of ingress and egress to all who would use it while the fire escape is designed to do no more than to permit ten-

ants a secondary means of escape should it become necessary.

There is in point of fact a salient difference between the common ventilating shaft employed by the agents in the instant case—it being one serving the entire St. Johns Apartments—and the single unit heating duct system used to advantage by the police officers in the *Silverman* case, supra. The heating duct in the *Silverman* case, supra, was part and parcel of the house in which Silverman's activities were carried on. Not so in the instant case. Any right respondents might seek to claim in the common ventilating system in this case is one shared by every tenant in the building in much the same way they share their rights in the respective hallways, stairwells and other passages of ingress and egress. Indeed, if it were large enough it could logically be said that the common ventilating shaft was available to every tenant for any use not inconsistent with either the terms of his leasehold or the purposes for which the property was let by the lessor. To be sure, it being limited in size so as to preclude any use such as that suggested above, said common ventilating shaft was a passage for air to each and every (jointly and severally) one of the tenants lawfully in the building. *The only exclusive dominion any tenant had with regard to the ventilating shaft was the right to either open or close the louvers as it may have suited them at any given time.*

Though there is no evidence whatever in the record in the case at bar to demonstrate that in fact respondents' rental rights gave them any rights whatever in said common ventilating shaft, even if it be conceded arguendo (the only way petitioner might) that they in fact had some degree of a possessory interest therein, it was, petitioner respectfully submits, an interest shared by each and every other tenant indivisibly. Therefore, it is folly to suggest that even this may be characterized as a "constitutionally protected area."

Just as the fire escapes of the Shoreham Hotel in Washington, D. C., are not a part and parcel of the rights inuring to the roomers there, so in this case the fire escape could not so be styled. Just like the Shoreham Hotel's duct work provides warmth in the winter and refrigerated air in the summer, it does not become the property of any given roomer; except insofar as it provides them with that beneficial service, so here the common ventilating shaft was, except for the service it provided the several tenants, if anybody's property, the lessors'.

If the above rationale should be in any way deemed defective, the following result must come about, to-wit: if a lawfully occupying tenant in an apartment several stories above that of a suspect's (as well as laterally distant from him) were to remove the grid from the ventilating shaft that entered his apartment and simply place

a powerful pick-up microphone inside the duct-work (according to respondents—their duct-work), whatever his microphone had picked up would in fact be useless as evidence on the theory that it was obtained by an invasion of the privacy of a constitutionally protected area. Such a result, though seemingly possessed of logic is, of course, not only impossible but indeed incredulous, for no illegal intrusion whatever was made because the suspicious tenant had a right in the duct-work not in the least subservient to that of the suspected tenant.

If, on the other hand, respondents would argue that their possessory interest in said duct-work was limited to the physical perimeter necessary to serve their particular apartment, then one wonders just how other tenants in that same building could secure ventilation from that restricted and private area. This, of course, is where the head of the monster must fall, to-wit: must this not again be likened to the case of an outside fire escape? Since the outside fire escape is physically attached to each apartment it serves, one might argue that the tenant rents or leases that too. Yet, who would argue that the very purpose for which it is designed, erected and maintained is to serve all the tenants? We think that no one could, in good conscience, argue that point. By the same token, we respectfully submit that there is not one scintilla of difference in principle between the fire escape illustration and the common ventilating shaft here involved.

At first blush it might be said (certainly respondents do) that this case falls squarely within the purview of this Court's condemnation in the *Silverman* case, supra. Perhaps conversely, an objectively inclined and totally disinterested third party might urge that the factual situation here fell neither within the *Silverman v. U.S.*, supra, case, nor within *Goldman v. U.S.*, 1942, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322, but rather somewhere in between. To be sure, if this were so, it well might require this Court to render an opinion covering those particulars, inasmuch as its opinions in the *Silverman* and *Goldman* cases, supra, and *On Lee v. United States*, 1952, 343 U.S. 747, 751, 72 S.Ct. 967, 96 L.Ed. 1270, and *Olmstead v. United States*, 1928, 277 U.S. 438, 48 S. Ct. 564, 72 L.Ed. 944, do not in fact limn the question.

Equating the fire escape illustration set out ante with that of the "detectaphone" employed in the *Goldman* case, supra, it does appear that a conclusion of absolute mirror images must follow—the respective areas from which the intelligence was gleaned being public and private; neither one of which caused an illegal invasion of the suspect's own privacy.

Collocating this Court's reasoning in *Olmstead v. U.S.*, supra, wherein it said:

> "'There was no entry of the houses or offices of the defendants.' 277 U.S., at 464. Relying upon these circumstances, the Court reasoned that '/t/he intervening wires are not part of (the defendant's) house

> or office any more than are the highways along which they are stretched.' 277 US, at 465."

with the (by now) obvious fact that this ventilating shaft could not be, by any stretch of the imagination, considered a part of respondents' apartment any more than was a segment of said ventilating shaft located several stories above and to the rear of their apartment; one must conclude that even that guiding principle (*Olmstead v. U.S.*, supra) has far more applicability here than would the *Silverman* case, supra, at any given time.

When placed in juxtaposition to this Court's opinion in *On Lee v. U.S.*, supra, wherein, it was said:

> "'. . . no trespass was committed.' The agent went into the petitioner's place of business 'with the consent, if not by the implied invitation, of the petitioner.' 343 US, at 751, 752."

one is compelled to note (by dint of negative comparison) the controlling aspect set out therein of the case at bar, to-wit: the agents in the *On Lee* case, supra, were lawfully in the premises either with the consent or by the implied invitation of On Lee—here, since no ownership, custody, interest, control, or other form of possession of said common ventilating shaft was vested in the respondents, no consent or implied invitation by the respondents could conceivably have been given the investigating officers. Indeed none was necesary.

Just as this Court must agree that a tenant in an apartment building whose emergency egress is assured by virtue of a physically attached external fire escape over which no tenant has any control, interest or custody (which is not that of every tenant), so here the Court must conclude that a tenant in the St. Johns Apartment building whose ventilating needs are served by virtue of a common ventilating shaft has no control, interest, or custody (which is not that of every tenant) over said common ventilating shaft.

It must at once be apparent that neither *Silverman* nor *Goldman* quite cover the factual situation giving rise to the decision here being assailed. Petitioner considers that it falls more nearly within the permissive behavior in *Goldman*. Respondents, and in fact the court below consider it to be more nearly if not totally governed by the judicially condemned activities in *Silverman*. It is a fact, we believe, that the spectrum of neither of the two cases quite reached this matter.

Though the opinions of the court below do not reflect the *sub rosa* apprehension of the court that once privacy and relative freedom from all forms of eavesdropping was at stake, such apprehension was painfully apparent

from inquiries made by the judges during argument. If in fact such fears are harbored, then we wonder at why the eavesdropping in the *Goldman* case, supra, was not condemned by this Court. Certainly the moral revulsion which eavesdropping generates in many people was as harmful there as it may be said to be here.

The same analysis may be applied with regard to the circumstances existing in *On Lee v. U. S.*, supra, wherein this Court did not feel constrained to condemn that eavesdropping.

Can there be any different analysis when viewing this Court's opinion in *Olmstead v. U.S.*, supra, where it did not find any basis upon which to condemn the obvious eavesdropping there?

To Goldman, Olmstead, and On Lee surely it must be little if indeed any comfort to suddenly be advised that despite the fact that eavesdropping formed the basis for their convictions, they cannot be heard to complain simply because Silverman was, in a sense, fortunate enough to have his nefarious activities surrounded by his own physical ventilating system.

Assuming without deciding that this Court meant what it said in the *Silverman* case, supra, and further assuming without deciding that such is the present law, it is respectfully submitted that there is at least as much difference between the circumstances in this case and Silver-

man as there was between either *Goldman, On Lee* and *Olmstead* and the *Silverman* case, supra.

Indeed it well may be that upon further examination this Court may feel that the electronic surveilance here is likewise one which should be condemned.

Petitioner does not reckon without knowledge of this obvious fact. Likewise this Court may elect to conclude that in fact it was little different, if indeed any, than that which it found acceptable in *Goldman,* supra.

Terminally, it is a fact that this Court may find that the activities here properly belong at neither end of the spectrum but rather somewhere in between and as such in an area which needs this Court's graphic announcement of either approval or denunciation.

The question here involved is one which must be decided by this Court so that the limbo in which these circumstances surely exist may have a well-defined logical and legal perimeter which all may observe.

CONCLUSION

Your petitioner has endeavored to demonstrate that the Fifth Circuit Court erred in determining the issue of the

validity of the electronic surveilance posed by this case. It is believed that we have shown the Court simply placed these circumstances within the pale of the *Silverman* case, supra, without any legal or logical genesis. The salient conflicts between their decision in this case and the decisions of this Court in the *Goldman*, *On Lee* and *Olmstead* cases, supra, demonstrates beyond any reasonable doubt the error committed by the court in rendering its decision in the premises.

It is for the aforesaid reasons that petitioner prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the premises.

Respectfully submitted,

L. L. WAINWRIGHT
Director, Division of Corrections
State of Florida,
Petitioner.

JAMES W. KYNES
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General
Counsel for the Petitioner.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to the Honorables A. K. Black, Attorney at Law, Lake City, Florida, and M. H. Myerson, Professional Building, Jacksonville, Florida, counsel for the respondents, by mail, this ..... day of May, 1964.

GEORGE R. GEORGIEFF
Assistant Attorney General
Of Counsel for the Petitioner.

APPENDICES

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Floyd L. Cullins, Petitioner,

—VS—

Louie L. Wainwright, Director,
Division of Corrections, State of Florida, Respondent.

ORDER DISMISSING RULE TO SHOW CAUSE AND DENYING PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Floyd L. Cullins, heretofore filed his petition for writ of habeas corpus in this court. On the 12th day of June, 1963, an order to show cause, directed to respondent, was entered, requiring a return to said order to be filed with this court on or before June 28, 1963. Hearing upon said petition, the order to show cause, and the respondent's return thereto was had in in open court before the undersigned judge at Jacksonville on Friday, July 12, 1963.

Petitioner was represented by counsel of his own choice, the Honorable M. H. Myerson and the Honorable A. K. Black, with the respondent being represented by the

Honorable George R. Georgieff, Assistant Attorney General.

Contemporaneously, counsel for petitioner filed in this court on June 12, 1963, an application for bail, seeking petitioner's release thereunder.

Having considered the petition for writ of habeas corpus heretofore filed in this cause, respondent's return thereto, the arguments of counsel for petitioner and counsel for respondent, and being fully advised in the premises, it is

ORDERED:

(1) The application for bail is specifically denied.

(2) The order to show cause, directed to the respondent by this court's order of June 12, 1963, is discharged.

(3) The petition for writ of habeas corpus is specifically denied.

(4) The issuance of a certificate of probable cause, as contemplated by Title 28, United States Code, Section 2253, is granted.

DONE AND ORDERED in chambers at Jacksonville, Florida, this 17th day of July, 1963.

_____

Chief Judge

CC: Honorable M. H. Myerson
Professional Building
Jacksonville, Florida

Honorable A. K. Black
101 East Madison Street
P. O. Box 527
Lake City, Florida

Honorable George R. Georgieff
Attorney General's Office
Capitol Building
Tallahassee, Florida

APPENDIX I

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NO. 63-118-Civ-J

William H. "Bill" Cross, Petitioner,

—VS—

Louie L. Wainwright, as Director, Division of Corrections, State of Florida, Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Presented to this Court on December 6, 1963, is the petitioner's petition for writ of habeas corpus. As a part of this petition, petitioner has included his sworn statement of insolvency.

This Court has jurisdiction (under Title 28 U.S.C. § 2254), since the petitioner has exhausted all available state remedies.

In his petition, the petitioner alleges that he is raising the identical issues raised by Floyd Cullins in his petition for writ of habeas corpus directed to this Court and dated June 7, 1963. (63-118-Civ.-J.)

Since the identical issues are sought to be raised, no purpose would be served by an additional hearing. The result here is governed by the result reached, after full hearing and argument, with respect to Mr. Cullins' petition. That record will be incorporated here by reference. Upon consideration of this petition and of the record in the Cullins case, it is

ORDERED:

1. That petitioner is granted leave to proceed in forma pauperis for the purpose of filing his petition, and for that purpose alone.

2. That the complete record including testimony and exhibits on file in the case of Floyd Cullins, Petitioner, vs. Louie L. Wainwright, as Director, Division of Correction, State of Florida, No. 63-118-Civ.-J, is incorporated herein by reference.

3. That the petition for writ of habeas corpus is denied.

4. That a certificate of probable cause (Title 28 U. S. C. 2253) is likewise denied.

DONE AND ORDERED at Jacksonville, in this District, this 26th day of December, 1963.

_____

United States District Judge

Copies mailed to:

Honorable Richard W. Ervin, Office of the Attorney General, Tallahassee, Florida.

Honorable Louie L. Wainwright, Director, Division of Corrections, Tallahassee, Florida.

Mr. William H. "Bill" Cross, P. O. Box 221, Raiford, Florida 32083.

APPENDIX I

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 63-284-Civ-J

William H. "Bill" Cross, Petitioner,

—*VS.*—

Louie L. Wainwright, as Director, Division of Corrections, State of Florida, Respondent.

ORDER AMENDING DECEMBER 26, 1963, "ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS"

In entering my Order of December 26, 1963, denying the Petition for Writ of Habeas Corpus herein, it was my purpose to place the petitioner in precisely the same position with respect to relief afforded or denied by this Court as the petitioner Floyd L. Cullins was placed in by the Order in Case No. 63-118-Civil-J (the Cullins Petition) dated July 29, 1963.

My Order entered December 26, 1963, deviates from the Cullins Order in one material particular: This Court by its Order of July 29, 1963, granted Mr. Cullins the Certificate of Probable Cause contemplated by Title 28, U. S. C. § 2253; the December 26, 1963, Order in this

case denied to the present petitioner the Certificate of Probable Cause contemplated by Title 28, U. S. C. § 2253. The present Order is entered to correct this difference between the treatment of the two cases and to place the two petitioners in precisely the same position as far as the relief afforded or denied by this Court is concerned.

In consideration of the foregoing, it is

ORDERED that numbered paragraph 4 of this Court's Order herein of December 26, 1963, Denying Petition for Writ of Habeas Corpus is amended by striking said paragraph 4 and by adding to said Order the following language:

" . . . . 4. That the Certificate of Probable Cause contemplated by Title 28, U. S. C., § 2253, is hereby issued, and this Order is intended to serve as this Court's Certificate that probable cause exists for an appeal to the United States Court of Appeals, Fifth Circuit, from this Court's Order."

DONE AND ORDERED at Jacksonville, Florida, this 27th day of December, 1963.

_____

Chief Judge

Copies mailed to:

Honorable Richard W. Ervin, Attorney General, Tallahassee, Florida.

Honorable Louie L. Wainwright, Director, Division of Corrections, Tallahassee, Florida.

Mr. William H. "Bill" Cross, P. O. Box 221, Raiford, Florida 32083

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20784

Floyd L. Cullins, Appellant,

versus

Louie L. Wainwright, Director, Division of Corrections, State of Florida, Appellee.

Appeal from the United States District Court for the Middle District of Florida

(February 14, 1964.)

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

JONES, Circuit Judge: The material facts here are not complex and are not in dispute. Apartment 607, in a downtown apartment house in Jacksonville, Florida, was rented to William H. Cross. On October 17, 1958, Special Agents of the Florida Sheriff's Bureau, with the consent of the manager of the apartment building, went into Apartment 707, directly above the Cross apartment. In Apartment 707 they remove a grille from an air shaft and lowered a microphone down the air shaft so that it was

opposite a grille in Apartment 607. Although it may not be clearly established of record, it was conceded by the Assistant Attorney General of Florida that the air shaft, as it passed through the sixth floor, was entirely surrounded by the interior walls of Apartment 607. The microphone was wired to recording and listening devices operated by the officers in the apartment above. Using this electronic equipment the officers overheard conversations between Cross, the tenant of the apartment, and others, including the appellant. The voices of Cullins and Cross were recognized. From the conversations the officers became convinced that Cullins and others were operating a lottery enterprise. The information so obtained was incorporated in an affidavit of probable cause upon which a warrant was issued for the search of Apartment 607. Cullins and Cross were at the apartment and were placed under arrest. A search was made and gambling paraphernalia were seized.

Cullins, Cross and others were charged by the State of Florida with a violation of its lottery laws. Cullins filed a motion to suppress the evidence procured by the search on the ground that the search was in violation of his constitutionally protected right to be secure against unreasonable search and seizure. Objections were made to the introduction of the evidence procured at the raid. The motion to suppress was denied. The objections to the admission of evidence were overruled. Cullins was convicted on August 7, 1959. State remedies were exhausted, the validity of the search being upheld in the state courts. A petition for habeas corpus was filed in

the United States District Court. After a hearing at which the facts herein recited were developed, the court dismissed the habeas corpus proceeding and issued a certificate of probable cause so as to permit an appeal to this Court. 28 U.S.C.A. § 2253. In making the announcement that a certificate of probable cause would be issued, the district judge observed that "the court certifies probable cause, because this is a field that I would like to see examined a little more."

The area is not one which has been free from exploration. The Supreme Court has had occasion to set forth the guiding principles in a number of significant decisions. *Lopez v. United States*, 373 U. S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462, *Silverman v. United States*, 365 U. S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734; *On Lee v. United States*, 343 U. S. 749, 72 S. Ct. 967, 96 L. Ed. 1270; *Goldman v. United States*, 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322; *Olmstead v. United States*, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, 66 A.L.R. 376. The evidence procured by the use of electronic eavesdropping devices becomes inadmissible only where there has been an unauthorized physical invasion of the petitioner's premises under such circumstances as would amount to a violation of the Fourth Amendment. The decision which is most nearly in point factually to the case before us is the *Silverman* case. In that case the petitioner occupied a dwelling which shared a party wall with an adjoining house. Police officers, in the adjoining house, inserted a foot-long spike into the party wall until the spike made contact with a heating duct in the house of the petitioner.

Attached to the spike were a microphone, an amplifer, a power pack, and earphones. With this equipment, conversations of the petitioners and others were overheard and the evidence so obtained was used in evidence against the petitioners at their trial on gambling charges and played a substantial part in their convictions. It was held that there was a physical penetration into the premises of the petitioners in violation of their constitutional rights. The conversations were set aside.

The appellant Cullins urges that the *Silverman* case is in point and requires a reversal of the order denying his application for a writ of habeas corpus. On the other hand it is contended on behalf of the State of Florida that there has been no invasion or penetration of the apartment of Cross, and hence no rights were infringed. The State stresses the fact that in *Silverman* the duct was wholly within and served only the dwelling which the petitioners occupied, while the ventilating shaft in this case extended through the building vertically and served, not only the Cross apartment, but a number of others directly above it and directly below it. The State compares the vertical shaft to a horizontal hallway providing access to several rooms or apartments on the same floor. Plausible as this analogy may seem, it is fallacious. That portion of the shaft between the floor and ceiling of Apartment 607 is wholly within the apartment and, we think, is a part of it. To indulge in the distinctions that would permit a contrary conclusion would ignore the practical realities of the situation. The lowering of a microphone into that portion of the ventilating shaft was an invasion

of a constitutionally protected area and violated the Fourth Amendment rights of those in the apartment whose conversations were overheard by means of the electronic eavesdropping.

It follows that the order of the district court must be reversed and the proceeding remanded for further action.

REVERSED AND REMANDED.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21177

William H. "Bill" Cross, Appellant,

versus

Louie L. Wainwright, Director, Division of Corrections, State of Florida, Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(March 5, 1964.)

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

PER CURIAM: The appellant was indicted, tried and convicted in the courts of Florida, as a codefendant with Floyd L. Cullins. They were represented by the same counsel and asserted the same defenses. Both Cullins and the appellant Cross, after exhausting state remedies, sought relief from their convictions by habeas corpus. That relief was denied in both instances. Both Cullins and Cross appealed to this Court. In the *Cullins* case,[1]

decided February 14, 1964, we reversed the order of the district court. There being no factual difference, the same result is reached here as in the *Cullins* case. Therefore, the order of the district court is reversed and the proceeding remanded for further action.

REVERSED AND REMANDED.

[1] Cullins v. Wainwright, Director; No. 20784.